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SUPREME COURT, U.S.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

OCTOBER TERM, 1949

## No. 82

THE UNITED STATES OF AMERICA, EX REL. OTTO A. WILLUMEIT, PETITIONER,

*vs.*

W. F. WATKINS DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MAY 26, 1949.

CERTIORARI GRANTED JUNE 27, 1949.

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1949

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*vs.*

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[fol. 1]

# IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, ex rel., OTTO A. WILLUMEIT, Relator-Appellant,

vs.

W. F. WATKINS, • • • Immigration and Naturalization Service, or whosoever may have custody of Otto A. Willumeit, etc., Respondents-Appellees

STATEMENT UNDER RULE 15, SUBDIVISION (b)

This is an appeal from an order of the Honorable Alfred C. Coxe, United States District Judge, entered on December 17, 1947, in the Office of the Clerk of the United States District Court for the Southern District of New York, dismissing a writ of habeas corpus and remanding the relator to the custody of the respondent, after oral argument. No opinion was rendered.

The appellant is represented by the Legal Aid Society (Eugene H. Nickerson of Counsel) and the respondent is represented by John F. X. McGohey, United States Attorney for the Southern District of New York (Harold J. Raby of Counsel).

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[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

Civ. 42-30

WRIT OF HABEAS CORPUS

To: W. Frank Watkins, District Director of Immigration and Naturalization for the District of New York and/or whomsoever may have the custody of the body of Otto A. Willumeit

You are hereby commanded that you have the body of Otto A. Willumeit, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, before one of the Judges of the United

States District Court within and for the District aforesaid, on the 13th day of June 1947 at 10:30 o'clock in the forenoon of that day, in the United States Court House, Room 506, in the Borough of Manhattan, City of New York, to do and receive all and singular those things which the said Judge shall then and there consider of you in this behalf, and have you then and there this Writ.

Witness, the Honorable John C. Knox, Judge of this Court, at New York, N. Y., in the said District, this 6th day of June, 1947.

(S.) William V. Connell, Clerk.

Writ allowed. June 6th, 1947.

(S.) Alfred C. Coxe, U. S. D. J.

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[fol. 3] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF HABEAS CORPUS

The Petitioner Otto Albert Willumeit, respectfully represents and charges unto the Court as follows:

1. That he is restrained, detained and deprived of his liberty within the Southern District of New York, N. Y. and the territorial jurisdiction of this Court by the Respondent W. F. Watkins, as District Director of Immigration and Naturalization of the United States District Court of New York and his agent, under color of authority of the United States of America.

2. That the restraint, detention and deprivation of the liberty of this Petitioner arose out of the following facts and circumstances:

3. That in the year of 1925 this Petitioner lawfully entered the United States; that in the year of 1925 Petitioner made a declaration of intention to become an American citizen, and thereafter *was admitted to citizenship on or about the month of April, 1931* in the Lake Superior Court of Hammond, Indiana; that in the year of 1942 and eleven years after this Petitioner had been admitted to citizenship, the United States of America instituted proceedings against him to cancel his certificate of naturalization and [fol. 4] to denaturalize him upon the claim that said certificate had been procured by fraud; that subsequently, in the

year of 1944, a decree cancelling this Petitioner's certificate of citizenship and denaturalizing him was entered by the District Court for the Southern District of Illinois, Eastern Division;

4. That on April 27, 1946 this Petitioner was arrested by certain agents of the United States Bureau of Immigration and Naturalization and taken to Ellis Island, New York; That said arrest so made by said agents was based upon the claim asserted by them that Petitioner was an alien enemy whose presence in the United States was dangerous to the public peace and safety, and upon no other ground or claim whatsoever, and that said agents were subordinates of the said W. F. Watkins who is made Respondent in the Petition and has stated that they are about to take him to Ellis Island, New York and from there to remove him from the United States to some place unknown to this Petitioner.

5. That on November 7, 1946 a petition for rehearing of the Final Order and Decree entered in the United States District Court, Chicago, Illinois, in the denaturalization matter of this Petitioner was presented and filed before the Hon. Judge Campbell of that Court;

[fol. 5] 6. That Petitioner is informed that up to date of the filing of this writ no decision has been rendered on said petition for rehearing by the Hon. Judge Campbell.

Wherefore, Petitioner prays that a writ of habeas corpus be issued directed to W. F. Watkins, as District Director of Immigration, requiring him to bring before the Court said Petitioner to do and receive what this Court shall then and there consider concerning him on his behalf, and to restrain the said W. F. Watkins to remove the Petitioner from the United States until such time, a decision has been rendered in the now pending application for rehearing on Petitioner's illegal denaturalization and up to and including the statutory time limit, in which, if need be, Petitioner has a right to appeal an adverse decision of the lower court to the Circuit Court of Appeals.

(S.) Otto A. Willumeit. Otto Albert Willumeit, in person.

[fol. 6] *Duly sworn to by Otto Albert Willumeit. Jurat omitted in printing.*

[fol. 7] IN UNITED STATES DISTRICT COURT

AMENDED PETITION FOR WRIT OF HABEAS CORPUS

The petitioner Otto Albert Willumeit, respectfully represents and charges unto the Court as follows:

1. That he is restrained, detained and deprived of his liberty within the Southern District of New York, New York, and the territorial jurisdiction of this Court by the respondent W. F. Watkins, as Director of Immigration and Naturalization of the United States District of New York and his agents, under color of authority of the United States of America.

2. That the restraint, detention and deprivation of the liberty of this petitioner arose out of the following facts and circumstances:

3. That the petitioner was born in Sarrebourg, France, then a part of the German Empire, and lawfully entered the United States; that in the year of 1925 he made a declaration of intention to become an American citizen, and thereafter was admitted to citizenship on or about the month of April, 1931. That in the year of 1942 and more than five years after this petitioner had been admitted to citizenship, the United States of America instituted proceedings against him to cancel his certificate of naturalization and to denaturalize him upon the claim that said certi- [fol. 8] ficate had been procured by fraud; that subsequently a decree cancelling this petitioner's certificate of citizenship, and denaturalizing him was entered by the District Court for the Northern District of Illinois, Eastern Division;

4. That at all times prior to April, 1931, it was provided by the laws of Germany:

"A German who has neither his residence nor a permanent abode in Germany loses his citizenship in acquiring foreign citizenship, provided the foreign citizenship is acquired as a result of his own application therefor . . .

"Citizenship is not lost by any one who before acquiring foreign citizenship has secured on application the written consent of the competent authorities of his home state to retain his citizenship."

That at the time of said naturalization, this petitioner had no residence or permanent abode in Germany, that he became a citizen of the United States as a result of said application for citizenship, that prior to acquiring the United States citizenship he did not apply for or secure the written consent of the proper authorities of his former home state to retain his citizenship.

5. That upon the cancellation of petitioners certificate of citizenship, he has become, and now is a stateless person;

6. That on April 27, 1946 this petitioner was arrested by certain agents for the United States Bureau of Immigration [fol. 9] and Naturalization and taken to Ellis Island, New York;

7. That said arrest so made by said agents was based upon the claim asserted by them that this petitioner was an alien enemy whose presence in the United States was dangerous to the public peace and safety, and upon no other ground or claim whatsoever and that said agents were subordinates of said W. F. Watkins who is made respondent in this Petition and have stated that they are about to take him to Ellis Island, New York and from there to remove him from the United States to some place unknown to this petitioner.

8. That Tom C. Clark, Attorney General of the United States, claims, asserts that his Excellency, Harry S. Truman as President of the United States, "by proclamation" on July 14, 1945 "acting under the authority of the Alien Enemy Act of 1798 (50 U. S. C. 21-24)" made the "following regulations additional and supplemental to those prescribed by earlier proclamations:

> 'All alien enemies now and hereafter interned within the continental limits of the United States pursuant to the aforesaid proclamations of the President of the United States who shall be deemed by the Attorney General to be dangerous to the public peace and safety of the United States because they have adhered to the aforesaid enemy governments or to the principles of [fol. 10] government thereof shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom

in accordance with such regulations as he may prescribe'."

9. That the petitioner is pursuing his petition for rehearing in the United States District Court in Chicago and an appeal from an adverse ruling in any court will be taken within the statutory time limit.

10. This petitioner states that said restraint and detention of him, and the said deprivation of his liberty, by the said respondent, as aforesaid, is wrongful, illegal, and wholly without authority of law, for the following reasons:

1. Petitioner is not a native and citizen of Germany. Petitioner was born at Sarrebourg, Lorrain, then a part of the German Empire. Lorrian reverted back to France under the Versailles Treaty in 1919. Petitioner entered the United States under the French Immigration quota, and was considered by the Department of State a native of France which department issued a passport to the petitioner in 1933 with the following passport entry: Place of birth: France.

[fol. 11] In support of petitioners contention ~~that~~ he is a native of France, petitioner calls attention to the case "D'Esquiva v. Uhl" and quotes in substance therefrom:

* * * "The question of nativity is not a question of allegiance but a question simply of geography, locality of place of birth, and if we have to decide where a person is born we have to look at the spot on the map and we have to ask ourselves today, on the day when the matter is in Court, to which country belongs this spot? And if the answer is that it is in France, then the man is a native of France." * * * That is what the government said in the D'Esquiva case: "Well, you were born, let us say, in Vienna and Vienna was not a part of Germany. At the time of your birth, but not today, after the Anschluss, after the annexed Austria, since 1938, Vienna is a part of greater Germany of Hitler, and therefore, you are a native of Germany." * * * On this theory the D'Esquiva case was decided. The Court heard the entire argument of the government and put in the final decision, and they exemplified in the decision—they

said: "Let us take a man born in Alsace-Lorra ine. That may have been German at the time of his b rth. This does not make him a native of Germany in our [fol. 12] opinion." * * * That is the langua the court uses in his decision. And as a final proo of the validity of this argument, the petitioner refe to the brief of the government and the decision of the Circuit Court of Appeals. The petitioner fur her refers to the case of "Unecker v. McCoy" S.D. There, apparently the D'Esquiva decision was very ably argued. Unecker was born in Alsace-Lorra ne, and that is exactly a parallel case; and there Ju ge Vogel, in a very able and persuasive decision, quot ing extensively from the D'Esquiva case, came to the c on- clusion, that we have to ask—at that time we were still at war, to that time Alsace-Lorrain was still occupied by Germany, he said, all that we have to ask is does our State Department recognize Alsace-Lorrain today as a part of France". And under instructions of this Judge, a telegram was sent to the Secretary of State Stettinius. Mr. Stettinius answered that despite the occupation of Alsace-Lorrain during the war, despite the fact, the Hitler government immediately after the occupation of Alsace-Lorrain in 1940 had incorporated this country into Germany, our State Department did not recognize Alsace-Lorrain as a part of Germany, [fol. 13] but has always considered it a part of France. (Also: Gregoire v. U. S., recently decided in the U. S. C.-C., 2. Circuit, S.D. N.Y.)

2. Petitioner, a stateless person, is not subject to the regulations prescribed for alien enemies. Definition of Alien Enemy in "Questions and Answers on Regulations Concerning Aliens of Enemy Nationalities", page 2, question 9 "Who is considered an alien enemy? Answer: A person who is stateless, but who was a citizen or subject of Germany, Italy, or Japan at the time he lost all citizenship, is considered an alien enemy, and is subject to the regulations prescribed for alien enemies."

3. Petitioner is informed and believes and, therefore, charges the fact to be, that at the time, petitioner lost all citizenship, he was neither a citizen or subject of

Germany, Italy, or Japan, but a citizen and subject of the United States of America.

Wherefore petitioner prays that a writ of habeas corpus be issued, directed to W. F. Watkins as District Director of Immigration, requiring him to bring before the court said petitioner to do and receive what this Court shall then and there consider concerning him on his behalf, and then and [fol. 14] there show cause, if any he has, for the taking and detention of said petitioner; and your petitioner further prays, that the said Court may determine the legality of the imprisonment or restraint and detention of the liberty and threatened deportation of said petitioner, and thereupon dispose of this case as the law and justice may require.

(S.) Otto A. Willumeit. Otto Albert Willumeit in person.

*Duly sworn to by Otto Albert Willumeit. Jurat omitted in printing.*

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[fol. 15] In United States District Court

Return to Writ of Habeas Corpus

R. A. Vielhaber, says that he is and during all the times herein mentioned has been an attorney in the service of the United States Department of Justice, Immigration and Naturalization Service, attached to the office of the District Counsel, New York District; that in his official capacity he is authorized to make and in behalf of the respondent hereby makes the following return to the writ of habeas corpus herein.

In compliance with the direction of this Court, the body of the said alien in his own proper person is produced herewith before this Court at the time specified in the writ.

It is respectfully urged that upon its face the petition upon which the writ was granted is insufficient in law, and that the writ should therefore be quashed because

(a) The petition does not allege facts to show that the proceedings of the Department of Justice upon which was issued the warrant of deportation pursuant to which the said alien was held, were not regular, fair and in compliance with the statute applicable in such cases, nor facts

from which this Court can determine that the proceedings were either irregular, unfair or not in compliance with said [fol. 16] statute;

(b) The petition does not allege any facts which entitled this Court to review the findings and conclusion of the Department of Justice upon which the warrant of deportation was issued;

(c) It is not alleged that there was no evidence before the Department of Justice upon which it based or could have based its findings and conclusion in accordance with which the warrant of deportation was issued;

(d) It does not appear by allegation of facts that the issues sought by the petition now to be litigated in this Court have not already been determined by the Department of Justice adversely to the said alien in proceedings which were regular, fair and in compliance with the statute applicable thereto.

As appears by the records of the Department of Justice of the United States with respect to the above-named alien, which records are in possession of respondent and are available for inspection of the Court and of the relator:

1. This writ of habeas corpus relates to Otto Albert Willumeit or Otto Willameit, a forty-two year old native and citizen of Germany, who stated that he last entered the United States at El Paso, Texas, on or about October 24, 1941 and was admitted as a citizen of the United States, upon showing his citizenship certificate.

[fol. 17] 2. Relator was naturalized as a citizen of the United States in the Superior Court, Lake County, Indiana, on September 16, 1931. His naturalization was canceled in the United States District Court for the Northern District of Illinois, Eastern Division, on June 9, 1944 *nunc pro tunc*, as of May 23, 1944.

3. On October 14, 1946 and on October 16, 1946, a hearing was accorded the alien to show cause why he should not be deported, at the conclusion of which the presiding inspector recommended that relator be deported to Germany. On November 25, 1946, the Acting Commissioner, Immigration and Naturalization Service, ordered that the alien's hearing be reopened.

4. On January 9, 1947 and on January 10, 1947, the alien was granted a reopened hearing, at the conclusion of which the presiding inspector recommended his deportation to Germany.

5. On April 22, 1947, the Commissioner, Immigration and Naturalization Service, ordered that Willumeit be deported to Germany and ordered that execution of the warrant of deportation be deferred, pending final outcome of relator's petition for rehearing of the decision of the Court ordering cancellation of his United States naturalization. On May 16, 1947, the Board of Immigration Appeals affirmed the Commissioner's decision and on the same day a warrant of deportation was issued. The warrant of deportation was based on the fact that Willumeit had been found to be a [fol. 18] member of the undesirable classes of alien residents, that is, that he was an alien who had been convicted of conspiracy to violate the Espionage Act and also that at the time of entry to this country, he was not in possession of a valid unexpired immigration visa.

6. The Attorney General, by order dated June 22, 1945, ordered relator interned as a dangerous alien enemy, and on May 23, 1946, he ordered that the alien be removed from this country, since he was a dangerous alien enemy.

Wherefore, it is prayed that the writ of habeas corpus be dismissed and the alien be remanded to the custody of the Immigration and Naturalization Service.

Dated: New York, N. Y., October —, 1947.

R. A. Vielhaber.

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[fol. 19] In United States District Court

Order Dismissing Writ of Habeas Corpus

The writ of habeas corpus in the above-entitled action having come on to be heard before this court on the 12th day of November, 1947, and, after hearing Herman J. Roshwald, Esq. (Joseph W. Solomon, Esq., of Counsel) for the relator, in support of the writ, and John F. X. McGohey, United States Attorney for the Southern District of New York (William J. Sexton, Assistant United States Attorney, of Counsel), in opposition thereto, and upon the

petition for the writ of habeas corpus returned thereto, and all the papers and proceedings had herein, it is

Ordered that the writ of habeas corpus be dismissed, and it is

Further ordered that the relator be remanded to the custody of the Commissioner of Immigration and Naturalization at Ellis Island, New York Harbor, New York.

Dated: New York, New York, December 17, 1947.

(Sgd.) Alfred C. Coxe, U. S. D. J.

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[fol. 20] In United States District Court

Notice of Appeal

Notice is hereby given that the United States of America, Ex Rel Otto Albert Willumeit, the above-named relator, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the Order denying and Dismissing the Petition for Writ of Habeas Corpus entered in this action on the 17 day of December, A. D., 1947.

(s.) Herman J. Roshwadl, (s.) Joseph W. Solomon; of Counsel, Attorneys for Relators, 320 Broadway, New York 7, New York, Telephone: WOrth 2-3523.

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[fol. 21] In United States District Court

Affidavit of No Opinion

State of New York,
County of New York, ss.:

Eugene H. Nickerson, being duly sworn, deposes and says:

I have checked the records in the Office of the Clerk of the United States District Court for the Southern District of New York in the case of United States of America, ex rel. Otto A. Willumeit v. W. F. Watkins, * * * Immigration and Naturalization Service, or whosoever may have custody of Otto A. Willumeit, etc.

On information and belief no opinion was rendered by the District Court in dismissing the writ of habeas corpus.

Eugene H. Nickerson.

Sworn to before me this 19 day of November 1948. James G. Grady, Notary Public in the State of New York, Residing in New York County. (SEAL.)

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[fol. 22] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO EXHIBITS

It is hereby stipulated and agreed by and between the attorneys for the respective parties herein that the Central Office file of the Immigration and Naturalization Service affecting relator-appellant herein, which was furnished to the District Court as an Exhibit in the course of argument of this proceeding, need not be reproduced as a part of this record on appeal herein, but it will be handed up as an Exhibit on the argument of the appeal herein.

Dated: New York, November 22, 1948.

Eugene H. Nickerson, Attorney for relator-appellant,
John F. X. McGohey, Attorney for respondents-appellees.

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[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted.]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed that the foregoing is a true copy of the Transcript of Record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated: New York, November 22, 1948.

Eugene H. Nickerson, Attorney for relator-appellant,
John F. X. McGohey, Attorney for respondents-appellees.

[fol. 24] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 25] IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT—OCTOBER TERM, 1948

No. 123

(Argued December 8, 1948 Decided January 3, 1949.)

Docket No. 21184

UNITED STATES OF AMERICA, ex rel. OTTO A. WILLUMEIT, Relator-Appellant,

v.

W. F. WATKINS, District Director, Immigration and Naturalization Service, or whosoever may have custody of OTTO A. WILLUMEIT, etc., Respondent-Appellee

Before: Swan, Augustus N. Hand and Clark, Circuit Judges.

Appeal from the District Court of the United States for the Southern District of New York

Habeas corpus proceedings wherein an order was entered dismissing the writ. The relator has appealed. Affirmed.

Eugene H. Nickerson, Attorney for appellant.

John F. X. McGohey, United States Attorney, for appellee; Harold J. Raby, Assistant United States Attorney, of counsel.

OPINION

[fol. 26] Swan, Circuit Judge:

This is an appeal by the relator from an order dismissing a writ of habeas corpus. He is in the custody of the respondent under two orders: one, an order of the Attorney General, dated May 23, 1946, ordering his removal from the United States as an alien enemy; the other a warrant of deportation, dated May 16, 1947 directing that he be deported to Germany.

From the amended petition for the writ, the return thereto and the record of the proceedings before officials of the Immigration Service, the following facts appear: The relator was born in 1905 in Lorraine, then a part of Germany.

He came to the United States in 1925, on a German passport, as a quota immigrant charged to the French quota. In 1931 he was naturalized as a United States citizen by a decree of the Superior Court of Lake County, Indiana. In 1941 he crossed the border from El Paso, Texas, to Juarez, Mexico, and was allowed to re-enter three hours later upon showing his certificate of United States citizenship. In 1942 he pleaded guilty to an indictment charging violation of 50 U. S. C. §34 and was sentenced to imprisonment for five years. While serving this sentence a decree was entered against him with his consent in the United States District Court for the Northern District of Illinois cancelling his certificate of naturalization on the ground that it had been obtained through fraud in that he never intended to renounce allegiance to the German Reich. He was released from imprisonment in April 1946. The following month the Attorney General ordered his removal from the United States as a dangerous alien enemy, pursuant to 50 U. S. C. §21 and Presidential Proclamation No. 2655, 59 Stat. Part 2, 879. Thereafter, in October 1946, deportation proceedings were instituted against the relator, which resulted in the issuance of a warrant under date of May 16, [fol. 27] 1947, directing his deportation on two grounds: (1) that he was deportable under 8 U. S. C. A. §214 because at the time of his entry from Mexico in 1941 he was an immigrant not in possession of a valid immigration visa as required by 8 U. S. C. A. §213; and (2) that he was deportable under 8 U. S. C. A. §157 because of his conviction in 1942 of violating 50 U. S. C. §34. The writ of habeas corpus was sued out in June 1947 and was dismissed in November 1947 without opinion.

Because of the appellant's poverty the court obtained through The Legal Aid Society the services of an attorney to present his case on appeal, and we wish to express our appreciation of the highly competent and helpful manner in which Mr. Nickerson has performed this gratuitous public service.

It is urged that the appellant cannot be removed as an alien enemy because he falls within none of the categories specified in the Alien Enemy Act, 50 U. S. C. §21, namely, "natives, citizens, denizens, or subjects of the hostile nation * * *" Concededly he must be considered a "native" of France. *United States ex rel. Gregoire* v. *Watkins*, 2 Cir., 164 F. 2d 137. Whether the cancellation of his naturaliza-

tion caused him to become again a "citizen" or a "subject" of Germany would turn upon German law, which was alleged but no proof of which was offered. But a determination of this issue is not essential if the appellant is deportable upon either of the grounds stated in the warrant of deportation.

The first ground for deportation, namely, that the appellant's entry from Mexico in 1941 was illegal because the cancellation in 1944 of the 1931 decree granting him citizenship requires that that decree be deemed to have been always a nullity so that he must be considered to have been at all times an alien rather than a United States citizen, [fol. 28] seems highly doubtful;[1] but this issue also need not be decided in view of our conclusion as to the other ground for deportation.

The other ground is the Act of May 10, 1920 which now appears as 8 U. S. C. A. §157. This provides that "All aliens who since August 1, 1914 have been or may hereafter be convicted" of violating 50 U. S. C. §34, among other specified statutes, may be deported "if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States." At the time of the hearing before the immigration officials who found the appellant to be an undesirable resident, he was an alien by reason of the cancellation of his certificate of naturalization, although at the time of his conviction under 50 U. S. C. §34 he was a naturalized citizen. This is precisely the same situation as this court passed upon in *United States ex rel. Eichenlaub* v. *Watkins*, 167 F. 2d. 659, and in that case certiorari was denied November 15, 1948. The appellant asks us to reconsider the *Eichenlaub* decision and makes a cogent argument to prove that we were in error in construing § 157 to authorize the deportation of an alien who was a naturalized citizen when he committed the crime which rendered him an "undesirable resident." But our construction of the statute was not so plainly erroneous as to induce the Supreme Court to grant certiorari. Nor have we been convinced by further argument that Congress did not intend the statute to cover such cases as *Eichenlaub's* and the appellant's. The Act is concerned with the deportation of "undesirable" aliens; the appellant is an alien, and by reason of his conviction may be found to be an "undesirable

[1] See Note 6 A. L. R. 406 and cases there cited.

resident" of the United States whether he was an alien or a citizen when the crime was committed. On the authority of the *Eichenlaub* case the order is affirmed.

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[fol. 29] IN UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Charles E. Clark, Circuit Judges.

UNITED STATES ex rel. OTTO A. WILLUMEIT, Relator-Appellant,

v.

W. F. WATKINS, District Director, etc., Respondent-Appellee

Appeal from the District Court of the United States for the Southern District of New York.

JUDGMENT—Filed January 3, 1949

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fol. 30] [File endorsement omitted]

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. —

UNITED STATES, ex rel. WILLUMEIT, Petitioner,

v.

WATKINS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner(s),

It is ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 28th, 1949.

Robert H. Jackson, Associate Justice of the Supreme Court of the United States.

Dated this 25th day of March, 1949.

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[fol. 33] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 27, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 34] UNITED STATES OF AMERICA, DEPARTMENT OF JUSTICE, PHILADELPHIA, PA.

No. 0300-46619 A-6401740

WARRANT—DEPORTATION OF ALIEN

To: District Director of Immigration and Naturalization, New York, New York. Or to any Officer or Employee of the United States Immigration and Naturalization Service.

Whereas, after due hearing before an authorized immigrant inspector, and upon the basis thereof, an order has

been duly made that the alien Otto Albert Willumeit or Otto Willumeit who entered the United States at or near El Paso, Texas, on or about Sept. 1941 is subject to deportation under the following provisions of the laws of the United States to wit: The Act of May 10, 1920, in that he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: An alien who has been convicted of violation of U. S. C. Title 50, Section 34 (Conspiracy to violate Espionage Act, etc.); and the Immigration Act of May 26, 1924, in that, at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his direction, do hereby command you to deport the said alien to Germany, at the expenses of the appropriation, "Salaries and Expenses, Immigration and Naturalization Service, 1947," including the expenses of an attendant, if necessary. It is further ordered that execution of the warrant of deportation be stayed pending the final outcome of the petition for rehearing of the denaturalization proceeding.

For so doing this shall be your sufficient warrant.

Witness my hand and seal this 16th day of May, 1947.

A. R. Mackey, Chief, Exclusion and Expulsion Section.

rcp

[fol. 35] U. S. DEPARTMENT OF JUSTICE
Board of Immigration Appeals

File: A-6401740—New York
In re: Otto Albert Willumeit or Otto Willumeit
In Deportation Proceedings

In Behalf of respondent: Joseph W. Solomon, Esq.
300 Barlum Tower, Detroit, Mich.
Heard: May 1, 1947.

Charges:
Warrant: Act of 1920—Member of undesirable class
Lodged: Act of 1924—No immigration visa

Application: Suspension of deportation, voluntary departure and preexamination

Detention Status: Detained at Government expense.

**Findings of Fact, Conclusions of Law and Order—May 16, 1947**

Discussion: The Presiding Inspector and the Commissioner both recommend respondent's deportation on the warrant and lodged charges. Exceptions have been filed by respondent.

Respondent was born in the Province of Lorraine when that province was part of Germany. He admits that at the time of his birth he was a subject of Germany.

Respondent first came to the United States in September 1925. He was then admitted as a quota immigrant for permanent residence. On September 16, 1931 he was naturalized an American citizen. While still presumably a citizen of this country he made two trips to Germany and one brief visit to Mexico. His last entry occurred at El Paso, Texas, on October 24, 1941. In October 1942 proceedings were instituted in the United States District Court for the Northern District of Illinois to cancel respondent's naturalization on the grounds of illegality and fraud. With the consent of respondent a decree pro confesso was entered on June 9, 1944, canceling his certificate of naturalization on the grounds of fraud and illegality. Respondent did not appeal, and execution of the judgment then entered by the court was never stayed.

Recently a petition for rehearing of the denaturalization proceeding and asking that the judgment of the court cancel-

ing respondent's citizenship be set aside was filed by counsel for respondent. Because of that pending petition counsel contends that respondent should still be considered an American citizen. We see no merit in this contention. The court decree was entered pro confesso. No appeal was taken, and execution of the final judgment was never stayed. So far as we are concerned, that decree of the court is [fol. 36] binding upon us; until set aside or revoked by a court of competent jurisdiction, we must find that respondent is an alien.

Respondent contends that if he is not an American citizen, he is now stateless. The Commissioner found, on the basis of our treaty of peace with Germany after the First World War that respondent had never lost his German citizenship. Whether or not respondent is a national of Germany is, in the final analysis, a question of German law. The determination of foreign law is always a question of fact which must be established through evidence made part of the record. There is insufficient evidence before us at this time to find that respondent is a national of Germany. Nor is it necessary at this time to reopen the hearing and establish this fact, since a finding can be made, as we shall show below, as to the place of respondent's deportation without the necessity of now determining his nationality.

The denaturalization of the respondent on the ground of fraud was, in effect, a finding that he had never been an American citizen and had always been an alien. See *Johannessen* v. *United States*, 225 U. S. 227 (1912); *Luria* v. *United States*, 231 U. S. 9 (1913); *Rosenberg* v. *United States*, 60 F. (2d) 475 (C. C. A. 3, 1932), cert. den., 287 U. S. 645 (1932). At the time of his last entry on October 24, 1941, he should have been documented as an alien immigrant. He was not so documented. He did not present an immigration visa. The charge lodged at the hearing is sustained.

The warrant charge is laid under that portion of the Act of May 10, 1920 which provides for the deportation of all aliens, found by the Attorney General to be undesirable residents of the United States, "who since August 1, 1914 have been or may hereafter be convicted of any violation or conspiracy to violate any of the following acts or portion of acts, the judgment on such conviction having become final, namely: (a) an Act entitled 'an act to punish acts of interference with foreign relations, the neutrality,

and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes,' approved June 15, 1917 or the amendment thereof approved May 16, 1918."

Respondent in August 1942 was convicted in the United States District Court for the District of Connecticut on his plea of guilty, of violating Section 4 of the Act approved June 15, 1917 (50 U. S. C. 34) in that he conspired with others to violate Section 2 of that Act. On August 21, 1942 respondent was sentenced to imprisonment for 5 years. No appeal was taken and no stay of execution of judgment was granted. Respondent was released from imprisonment in April 1946.

[fol. 37] Counsel for respondent now contends that the judgment on respondent's conviction of conspiring to violate Section 2 of the Act of June 15, 1917, has not become final. Apparently counsel intends to petition the District Court in Connecticut for a rehearing just as he already has in the denaturalization case. What we said in connection with the finality of the denaturalization decree applies here also. We think that counsel's contention is without merit. The judgment of conviction has long since become final. Until set aside by a court of competent jurisdiction, we cannot hold that the judgment has not become final.

Counsel has also excepted to the finding that respondent is an undesirable resident of the United States, a jurisdictional finding that must be made before deportation can be ordered under the Act of May 10, 1920. *Mahler* v. *Eby*, 264 U. S. 32 (1924). We think that counsel's exception is also without merit. Respondent's conviction under the Act of June 15, 1917 is by itself enough to justify us in finding respondent to be an undesirable resident of the United States. *Mahler* v. *Eby*, supra. If additional evidence were necessary, and we do not think it is, this record contains ample evidence upon which a finding of undesirability can be made.[1] There is undisputed evidence in this

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[1] We need not and do not consider respondent's indictment and conviction in the Southern District of New York of conspiring to counsel persons to refuse to serve in the armed forces of the United States, a conviction that was set aside by the United States Supreme Court (*Keegan* v.

record that respondent was a member of the German-American Bund from September 1937 until its dissolution in December 1941. From 1939 on Respondent was the Chicago unit leader of this un-American organization. In January 1945 the Attorney General found respondent to be potentially dangerous to the security of this country and ordered his internment. On May 23, 1946 the Attorney General directed respondent's removal from the United States. We find that respondent is an undesirable resident of the United States.

As we said above, we cannot determine from this record respondent's present nationality; but it is clear that prior to establishing his residence in the United States, respondent's home was in Germany. In accordance with Section 20 of the Act of February 5, 1917 deportation can and will be directed to Germany. If that country refuses to accept respondent as a deportee, further consideration will be given to reopening the hearing to obtain evidence as to his nationality.

FINDINGS OF FACT

Upon the basis of all the evidence presented, it is found:

[fol. 38] (1) That respondent is a native of Germany and was a German national at birth;

(2) That respondent was naturalized in 1931;

(3) That in June 1944 the United States District Court for the Northern District of Illinois canceled respondent's naturalization on the ground that it had been obtained by fraud and illegality;

(4) That in August 1942 respondent was convicted of violating Section 4 of the Act approved June 15, 1917, in that he conspired with others to violate Section 2 of that Act;

(5) That no appeal was taken by respondent nor was execution of the judgment ever stayed;

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*United States*, 325 U. S. 478), as having any importance in determining whether respondent is an undesirable resident. Nor do we think the opinion of the Supreme Court in the *Keegan* case has any probative value in this proceeding.

(6) That respondent was sentenced to serve 5 years and actually was imprisoned until April 1946;

(7) That respondent is an undesirable resident of the United States;

(8) That respondent last entered the United States at El Paso, Texas, on October 24, 1941;

(9) That respondent was not then in possession of an immigration visa;

(10) That respondent, before establishing his residence in the United States, lived in Germany.

Conclusions of Law: Upon the basis of the foregoing findings of fact, it is included:

(1) That under the Act of May 10, 1920, respondent is subject to deportation in that he is found to be an undesirable resident of the United States and has since August 1, 1914, been convicted, the judgment of such conviction having become final, of conspiracy to violate part of the act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes," approved June 15, 1917, as amended;

[fol. 39] (2) That under Sections 13 and 14 of the Immigration Act of May 26, 1924, the respondent is subject to deportation in that at the time of entry, he was an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder;

3. That under Section 20 of the Immigration Act of February 5, 1917, the respondent is deportable to Germany, at Government expense.

Other Factors: Respondent has applied for suspension of deportation or alternatively, for voluntary departure and precxamination. He is married to a former national of Germany who is apparently a lawful resident of the United States. She is also in detention as a dangerous alien enemy. There are no children as issue of the marriage.

Respondent is occupationally a physician. He claims that he has property in the United States valued at about

$45,000. This property has been vested by the Alien Property Custodian.

We do not think that respondent should be granted any form of discretionary relief. However, we note that respondent's counsel momentarily expects a decision on the petition for a rehearing of the denaturalization case. Because of this fact we shall stay execution of the order of deportation to be entered herein until such time as this litigation is finally completed.

ORDER: It is ordered that the alien be deported to Germany at Government expense upon the charge contained in the warrant of arrest and on the charge lodged at the hearing.

It is further ordered that execution of the warrant of deportation be stayed pending the final outcome of the petition for rehearing of the denaturalization proceeding.

Thos. G. Finucane, Chairman.

MW:BPF

[fol. 40] U. S. DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A 6401740—New York (0300-46619).
In re: Otto Albert Willumeit or Otto Willumeit.

In Deportation Proceedings

In behalf of Respondent: Joseph W. Solomon, Esquire, 3000 Barlum Tower, Detroit 26, Michigan. Oral argument requested.

Charges: Warrant: Act of 1920—Member of undesirable class. Lodged: Act of 1924—No immigration visa.

Application: Suspension of deportation, voluntary departure and preexamination.

Detention Status: Detained at government expense.

FINDINGS AND ORDER OF COMMISSIONER—April 22, 1947

Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Presiding Inspector and served on the alien's attorney on March 13, 1947, are hereby adopted.

Discussion: This record relates to an alien, native and citizen of Germany, age 42, who testified that he last entered the United States on or about October 24, 1941 at El Paso,

Texas by automobile from Mexico, at which time he was admitted as a citizen of the United States upon showing his citizenship certificate. He further testified that he was not then in possession of an immigration visa or document in lieu thereof (p. 26).

The respondent was lawfully admitted to the United States for permanent residence at the port of New York ex SS "President Harding" on September 25, 1925 (Ex. 5). He was naturalized in the Superior Court, Lake County, Indiana on September 16, 1931. He testified that he left the United States about October 1933 and returned at New York about June 1935; that he left about September of 1935 and returned about June 1936. He states that he was admitted upon both of his returns as a United States citizen in possession of an American passport.

The respondent's naturalization was canceled in the [fol. 41] United States District Court for the Northern District of Illinois, Eastern Division, on June 9, 1944, nunc pro tunc as of May 23, 1944. The court, in cancelling the naturalization, found "that the defendant on September 16, 1931 fraudulently and illegally procured his certificate of citizenship by false representations and that the renunciation of allegiance to Germany and the oath of allegiance to the United States of America purportedly made by the said Otto Albert Willumeit in connection with naturalization, were false and fraudulent in that he never intended to renounce absolutely and forever all allegiance and fidelity to the German Reich, of which he was then a subject and he did not intend to support the constitution and laws of the United States of America against all enemies, foreign and domestic, and he did not intend to bear true faith and allegiance to the same, but actually intended to remain a subject of the German Reich and maintain his allegiance thereto; that said certificate of naturalization is subject to cancellation". The naturalization was declared "null and void" and the "defendant Otto Albert Willumeit is hereby forever restrained and enjoined from setting up or claiming any rights or privileges, benefits or advantages whatsoever under said order, entered on, to wit: September 16, 1931, by the Lake Superior Court of Lake County, Indiana, as aforesaid, or the certificate of citizenship issued by virtue of said order".

The warrant hearing in this case was begun October 14, 1946 and resumed October 16, 1946 notwithstanding the

alien's contention that he had not been granted sufficient time to have his attorney present. He consequently refused to answer the questions during the hearing. His preliminary statements and Exhibits 1 to 11 inclusive were introduced and the hearing closed and the record submitted. The Service on November 25, 1946 ordered the hearing reopened to give the alien ten days to make arrangements for representation by counsel if he so desired, and to introduce direct evidence showing whether the judgment for his conviction of conspiracy to violate the Espionage Act had become final.

The reopened hearing was held on January 9 and 10, 1947 and counsel was present. The attorney permitted the respondent to testify, subject to an objection to the jurisdiction of this Service on the ground that the respondent was still a citizen of the United States, inasmuch as he surrendered his naturalization certificate under circumstances which he claims were illegal and since the respondent has a petition for rehearing of the order cancelling his [fol. 42] naturalization presently pending. It is apparent that the time for taking an appeal from the court's order cancelling the naturalization of respondent has long since expired and the decision is final unless and until the court grants a petition for rehearing and sets aside the judgment of cancellation. Counsel's contention that the judgment is not final is without merit.

The respondent testified that he had been a German citizen up to the date in 1931 when he was admitted to United States citizenship, and that he automatically lost his German citizenship, pursuant to German law, upon acquiring United States citizenship, and his United States citizenship having been cancelled, he is now stateless (p. 27). Counsel stipulated the submission, in support of respondent's claim, of a text reference summarizing German law on the subject of nationality. However, such exhibit, #15, was not submitted. Exhibit 14 is certified true extract copy of Article 1 of the Treaty with Germany of August 25, 1921 and also Article 278 of the Treaty of Versailles. Article 278 provides that Germany undertakes to renounce any new nationality which has been or may be acquired by her nationals under the laws of the allied and associated powers and in accordance with the decisions of the competent authorities of those powers pursuant to naturalization laws or under

treaty stipulations, and to regard such persons as having in consequence of the acquisition of such new nationality, in all respects severed their allegiance to their country of origin. Since a competent United States court has determined in effect that in contemplation of law respondent is considered never to have been a United States citizen and never to have renounced his former allegiance in the naturalization process, the German authorities are bound by the determination of the United States Court to consider that the respondent's act of expatriation in the 1931 naturalization process was null and void and that he is a German citizen (p. 27).

The respondent is charged in the warrant of arrest with being subject to deportation under the Act of May 10, 1920 in that he has been found to be a member of the undesirable classes of alien residents enumerated in Section 1 of said Act, to wit: an alien who has been convicted of violation of U. S. C. Title 50, Section 34 (conspiracy to violate Espionage Act, etc.).

The pertinent portion of the Act of May 10, 1920 provides "that aliens of the following classes, in addition to those for whose explusion from the United States provision is made in the existing law, shall, upon the warrant of the Attorney General, be taken into his custody and deported [fol. 43] in the manner provided in Section 19 and 20 of the Act of February 5, 1917, * * *, if the Attorney General, after hearing, finds that such aliens are undesirable residents of the United States, to wit: (2) all aliens who since August 1, 1914 have been or may hereafter be convicted of any violation * or conspiracy to violate any of the following acts or portion of acts, the judgment on such conviction having become final, namely: (a) an Act entitled 'an act to punish acts of interference with foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes', approved June 15, 1917 or the amendment thereof approved May 16, 1918".*

Exhibit #7 is court record of indictment, conviction and sentence of the respondent in the District Court of the United States for the District of Connecticut, for violating the provisions of Section 34, Title 50, U. S. C. (Conspiracy to violate Espionage Act, etc., Section 32, Title 50 U. S. C.).

The indictment charges that the conspiracy occurred continuously from on or about January 1, 1941 to on or about December 6, 1941. The defendant was convicted on his plea of guilty August 21, 1942 and sentenced to five years imprisonment. The details of the conspiracy and the overt acts are set forth in the indictment (Ex. 7). The respondent was asked whether he had any comment to make with respect to his conviction for violation of Title 50, U. S. C., Section 34, the basis for the deportation charge, and he testified that he had been induced by deception to make a plea of guilty and maintained that he was not in fact guilty. It is not permissible to go behind the record of his conviction to consider such contention of the alien.

With reference to whether the judgment of conviction has become "final", a letter was sent to the clerk of the court in which this conviction occurred, requesting that a certified true copy of the docket entry with respect to the respondent's conviction be furnished, to establish whether an appeal had been taken. The clerk of the court replied stating that "our docket shows that on August 21 of 1942 this defendant was sentenced by Judge Smith to five years in custody of the Attorney General for imprisonment, judgment issued and was returned showing confinement on August 21, 1942 at Federal Correctional Institution, Danbury, Connecticut. Time for appeal has apparently long since expired" (Ex. 16). A certified true copy of the rule governing appeals in the United States District Court proceedings was introduced as Exhibit 17, which corroborates the clerk's statement as to expiration of the time for appeal. [fol. 44] The attorney takes exception to the conclusion that the judgment of conviction is final and in support of his claim that a rehearing may be granted by the court after the time specified in the rule for an appeal, introduced a court memorandum on petition for rehearing in the case of Hans Geisler, Civil Action No. 4650 (Ex. 18). It appears, however, that there is a distinction between an appeal and a petition for rehearing. The attorney contends that the judgment is not final because it is respondent's intention to file a motion to reopen the case. It is believed that the time of making an appeal having expired, the judgment of conviction is at the present time "final" within the meaning of the use of the term in the Act of May 10, 1920, notwithstanding the intention to petition for reopening.

In order to render an alien subject to deportation on the charge, it is necessary that the Attorney General after hearing find that the alien is an undesirable resident of the United States. The Attorney General on June 22, 1945 ordered that the respondent be interned as an alien enemy potentially dangerous to the public peace and safety of the United States. (Ex. 11). He was given a hearing before a repatriation hearing board, at his request, on May 7, 1946, and the Attorney General deeming "said alien enemy to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof", ordered on May 23, 1946 that "in the event the said alien fails or neglects to depart from the United States within the said thirty days, the Commissioner of Immigration and Naturalization is directed to provide for the alien's removal to Germany.

An indictment was filed in the United States District Court, Southern District of New York on July 7, 1942, charging the respondent, with others, with conspiracy, beginning about January 1, 1940 and continuing up to and including the date of the filing of the indictment, in violation of Title 50, U. S. C. A., Section 311 and 11 of the Selective Training and Service Act (conspiracy to counsel persons to refuse to serve in land and naval forces of the United States). The court on October 21, 1942 ordered the respondent sentenced, upon his conviction, to five years imprisonment (Ex. 9). However, the conviction was reversed by the Supreme Court (*Keegan et al* v. *United States*, 325 U. S. 478 (p. 13)).

[fol. 45] The respondent testified that he had been a member of the German American Bund from about September of 1937 until December of 1941, when the organization was dissolved, and that from 1939 until the date of dissolution he had been Chicago Unit Leader of the Bund. He testified that he did not participate in the issuance, but did participate in the dissemination of the Bund Command (Bundeshefehle #37), which had been the principal basis for his trial for violation of Title 50, U. S. C., Sections 311 and 11 of the Selective Service Act.

The Supreme Court in commenting upon the nature and purposes of the Bund pointed out that it was organized on the Fuehrer or leadership principle; that the president was

the leader and his order was law unless and until modified or abrogated by a convention; that members were expected to obey his orders; that "speeches and literature justify the inference that the Bund endorsed the Nazi movement in Germany, and if it did not actually advocate some such form of government in this country at least it assayed to create public opinion favorable to the Hitler regime and to the German National Socialist State. There is also much to the effect that the Bund is pursuing lawful aims within the constitutional rights of its members, and that its activities need not be hidden from governmental agencies. There is basis for suspicion of subversive conduct: there is matter offensive to one's sense of loyalty to our government's policies".

Upon the basis of the evidence adduced in the hearing, it is shown that respondent's naturalization was canceled on the ground that he at the time of his naturalization in 1931 did not truly renounce his allegiance to the German Reich; that he was convicted for conspiracy to violate the Espionage Act, as related in the indictment upon which he was convicted; that he was ordered interned by the Attorney General as an alien enemy potentially dangerous to the public peace and safety of the United States and subsequently upon hearing was deemed by the Attorney General to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof, and ordered to be removed to Germany by this Service; that respondent was a member of the German American Bund from September 1937 until December 1941 and was Chicago Unit Leader of the Bund from 1939 until December 1941; that respondent's membership in such organization supplies basis for suspicion of subversive or other conduct offensive [fol. 46] to a sense of loyalty to the policies of the United States. This evidence of record sustains a finding that the subject alien is an undesirable resident of the United States. The charge contained in the warrant of arrest is sustained.

The attorney contends in his brief that the circumstances of the respondent's pleading guilty were prejudicial and unfair; that the United States Attorney felt sufficiently interested in the merits of the defendant's position to speak in his behalf to the trial judge, and submitted copy of statement of the court and counsel at the imposition of sentence (Ex. 21). The court in such statement said that the defend-

ant did lend himself to the conspiracy and that a substantial sentence was indicated. As above stated, we cannot go behind the judgment of conviction.

There remains for determination the lodged charge that the respondent was an immigrant not in possession of an unexpired immigration visa at the time of his last entry at El Paso, Texas about October 24, 1941. The cancellation of respondent's naturalization had retroactive effect and respondent never having been a United States citizen in contemplation of law, was an alien at the time of his last entry and he did not possess an immigration visa. Inasmuch as the respondent entered the United States during the time when he was a participant in the conspiracy to violate the Espionage Act, the entry was presumably with intention to continue such conspiracy. Consequently, he is not believed to be entitled to the general waiver of documentary requirements granted by the Department of State in the cases of aliens who enter the United States illegally from contiguous territory between July 1, 1940 and December 31, 1942 after an absence to foreign contiguous territory of less than ninety days as set forth in O. I. 175.44. The lodged charge is also sustained.

The respondent applied for suspension of deportation and in the alternative, for voluntary departure and preexamination. He was married in 1933 in Chicago and he testified that his wife is stateless, she having automatically lost her German citizenship by her marriage to him at a time when he was an American citizen (p. 33). This contention appears to have no merit. There are no children (pp. 33, 34). The respondent's wife last reentered for permanent residence at Miami, Florida on February 6, 1939. She was placed in detention as an alien enemy on April 2, 1942 (p. 41) and is presently detained at Ellis Island under order [fol. 47] of the Attorney General. She testified that a repatriation order has been entered in her case, and that her appeal of the order in habeas corpus proceedings was denied. She indicated that an appeal from the denial will be filed as soon as other similar cases are disposed of (pp. 41, 42).

A finding having been made that the respondent is an undesirable resident of the United States, he would not be a proper subject for any type of discretionary relief. He will be ordered deported, with stay of execution of the warrant

of deportation pending outcome of his petition for rehearing of the decision of the court cancelling his naturalization.

Order: It is ordered that suspension of deportation, voluntary departure and preexamination be denied.

It Is Further Ordered that the alien be deported to Germany at government expense on the charges:

> That under the Act of May 10, 1920, he is found to be an undesirable resident of the United States and has, since August 1, 1914, been convicted, the judgment on such conviction having become final, of conspiracy to violate part of the Act entitled "An Act to punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes", approved June 15, 1917, as amended; and
>
> That under the Immigration Act of May 26, 1924, he was, at time of entry, an immigrant not in possession of a valid immigration visa and not exempted from the presentation thereof by said Act or regulations made thereunder.

It Is Further Ordered that execution of the warrant of deportation be deferred pending final outcome of the respondent's petition for rehearing of the decision of the court ordering cancellation of his United States naturalization.

In accordance with 8 CFR 90.3, the case is referred to the Board of Immigration Appeals for consideration.

Recommended.

Ilga Carusi, Commissioner.

Joseph Savoretti, Assistant Commissioner.

GWS.

TLM/ff.

[fol. 48] EXHIBIT No. 4

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 4713

UNITED STATES OF AMERICA

vs.

OTTO ALBERT WILLUMEIT

FINAL DECREE

The above entitled cause coming on for hearing in the trial on the merits of the issues herein on the 23rd day of May, A. D. 1944, upon the complaint of the United States of America to cancel the citizenship heretofore issued to Otto Albert Willumeit, defendant herein, and upon the written appearance of Otto Albert Willumeit in his own proper person and by the appearance of Joseph T. Harrington, counsel for Otto Albert Willumeit, and the plaintiff having offered to introduce evidence and testimony of witnesses duly sworn in support of the allegations of said complaint, and the defendant and his counsel having been present in open court, and the defendant and his counsel having stated to the court that it was the desire of the defendant not to contest the issues raised in the complaint of the United States, and the defendant having stated to the court that he now desires to surrender his certificate of citizenship to the court, and the court having heard the evidence and arguments of counsel, and being fully advised in the premises, finds the issues herein in favor of the plaintiff, and that said plaintiff is entitled to a decree [fol. 49] as prayed for in its said complaint.

And the court further finds that the plaintiff, the United States of America, filed its complaint on October 1, 1942, and on October 10, 1942, the United States Marshal returned a summons stating that the defendant was not found in the District. The court further finds that on January 13, 1943, an affidavit for publication was filed, and on January 18, 1943, a certificate of mailing was filed, and on January 20, 1943, a certificate of mailing notice was filed; that on January 26, 1943, a return receipt notice mailed was filed; that on February 2, 1943, a certificate of publication

from Law Bulletin was filed; that on February 15, 1943, on motion of plaintiff an order was granted giving leave to the plaintiff to take depositions on oral interrogatories of Vagn G. Callen, Carl E. Weiler, and Victor Ridder; that on March 10, 1943, the United States Attorney filed a petition to issue writ of Habeas Corpus Ad Testificandum; that on March 15, 1943, the court heard the statement of the defendant herein in open court that he had delivered to the Warden of Federal Detention Headquarters in New York City, New York, under date of March 10, 1943, the original of his answer to the complaint herein with a request to forward the same to the Clerk of this Court for filing, and the same not having been received by the clerk, it was ordered that leave be and was given to the defendant to file copy of said answer instanter, and the hearing on the writ of Habeas Corpus Ad Testificandum was thereupon continued to March 22, 1943; that on March 15, 1943, there was filed copy of the answer of the defendant; that on April 5, 1943, the Court ordered this case consolidated for trial for the purpose of hearing evidence from the plaintiff, and from all of the defendants, as to the organization, purposes, aims and relationship, if any, to the German Reich of the German American Bund and its pred- [fol. 50] ecessor organizations; that on April 13, 1943, a notice for taking depositions pursuant to Rule 30 of Civil Procedure was filed; that on April 22, 1943, a pretrial conference was held; that on September 15, 1943, the Court found the consolidated issue in favor of the Government and further ordered that the trial as to the issue of the German American Bund be severed, and ordered the case to proceed to trial separately as to the remaining issues, and this cause was set for trial on November 18, 1943, when it was reset to January 13, 1944, when it was reset to February 25, 1944, when it was reset to March 24, 1944, when it was reset to April 10, 1944; that on March 30, 1944, an order was entered granting leave to defendant to file petition for order on plaintiff to make available to defendant books and records, and hearing on said petition was continued; that on April 10, 1944, order was entered resetting this trial to April 24, 1944, when it was again reset by agreement to May 23, 1944; that on April 24, 1944, the cause came on for hearing on motion of Joseph T. Harrington, counsel for defendant, arguments were heard and concluded, and objections of United States were

overruled, and the United States Attorney was directed to make available for inspection by defendant and his attorney in advance of the trial of this cause various books, records, papers, photos, correspondence, newspapers, pamphlets, and other personal property pursuant to the petition of Joseph T. Harrington filed on March 30, 1944, and it was further ordered that a rule issue on the defendant to prepare and file on or before May 4, 1944, a motion for production of witnesses, Gerhard Wilhelm Kunze and Wilbur V. Keegan, together with a supporting statement setting forth what the defendant expected to prove by [fol. 51] said witnesses; and it was further ordered that leave be given to Joseph T. Harrington to prepare on or before April 26, 1944, a communication directed to the defendant herein and deliver the same in a sealed envelope to the United States Attorney, who was directed to forward said communication without delay to the said defendant at the Federal Detention Headquarters, New York City, New York. The Court finds that the United States Attorney, pursuant to said order, during the period beginning May 8, 1944, to May 23, 1944, daily exhibited to Otto Albert Willumeit, in advance of the trial of this cause, various books, records, papers, photos, correspondence, newspapers, pamphlets, and other personal property, pursuant to the petition of Otto Albert Willumeit; that the said United States Attorney forwarded to the defendant Otto Albert Willumeit in a sealed envelope a communication from his counsel; that on April 26, 1944, on petition a writ of Habeas Corpus Ad Testificandum was issued returnable on May 8, 1944, for the purpose of permitting the defendant to inspect said records prior to trial; that on May 8, 1944, this cause was called for hearing and all parties were present in open court with counsel; that an order on defendant's petition for writ of Habeas Corpus Ad Testificandum was denied as to the witness Gerhard Wilhelm Kunze and as to the witness Wilbur V. Keegan was allowed and a writ was ordered issued directed to the United States Marshal to produce Wilbur V. Keegan for the trial; that on May 18, 1944, the witness Wilbur V. Keegan arrived in the Northern District of Illinois; that on that date he conferred with the Assistant United States Attorney, Francis J. McGreal, and Joseph T. Harrington, counsel for the defendant, and the defendant Otto Albert Willumeit; that on May 19, 1944, on motion of the United

States Attorney and by agreement of defendant's counsel, and defendant himself, who appeared in open court, the witness Wilbur V. Keegan was remanded to the custody of [fol. 52] the Warden of the Federal Correctional Institution at Sandstone, Minn.; that on May 18, 1944, plaintiff filed a praecipe for subpoena for William Beyer, George Oltmanns, Fred Limbach, Joseph William Haas, Karl Moeller and Oscar S. Caplan; that on May 23, 1944, this cause came on for trial and at that time the defendant made a motion to dismiss this cause for want of jurisdiction, which motion was overruled, and the defendant thereupon made a motion to continue this cause for ten years, which motion was also overruled, and when the cause was thereupon called for trial the defendant thereupon consented and agreed to the cancellation of his certificate of naturalization and for the entry of a decree pro confesso in this cause, cancelling his certificate of citizenship in accordance with the prayer of the complaint heretofore filed herein.

The Court further finds that the said defendant Albert Otto Willumeit, on, to wit, September 16, 1931, fraudulently and illegally procured his certificate of citizenship by false representations and that the renunciation of allegiance to Germany and the oath of allegiance to the United States of America purportedly made by the said Otto Albert Willumeit in connection with his naturalization were false and fraudulent in that he never intended to renounce absolutely and forever all allegiance and fidelity to The German Reich, of which he was then a subject, and he did not intend to support the Constitution and laws of the United States of America against all enemies, foreign and domestic, and he did not intend to bear true faith and allegiance to the same, but actually intended to remain a subject of The German Reich and maintain his allegiance thereto; and that said certificate of naturalization is subject to cancellation.

It is therefore ordered adjudged and decreed that the said complaint of the plaintiff and the allegations therein [fol. 53] contained against the said defendant are true.

It is further ordered, adjudged and decreed that the final order entered by the Lake Superior Court of Lake County Indiana, on September 16, 1931, admitting the said Otto Albert Willumeit as a citizen of the United States of Amer-

ica, be and the same is hereby vacated, annulled and set aside, and that the certificate of citizenship, Number 3473383 issued by virtue of said order on September 16, 1931, be and the same is hereby cancelled and declared null and void, and that said certificate of citizenship be and the same is hereby ordered surrendered by the said defendant to the Clerk of this Court, and when so surrendered the Clerk of this Court is hereby ordered to mark the said certificate cancelled, and the defendant Otto Albert Willumeit is hereby forever restrained and enjoined from setting up or claiming any rights or privileges, benefits or advantages whatsoever under said order, entered on, to wit, September 16, 1931, by the Lake Superior Court of Lake County Indiana, as aforesaid, or the certificate of citizenship issued by virtue of said order.

It is further ordered, adjudged and decreed that in the event the said defendant, Otto Albert Willumeit, is not physically in possession of said certificate of naturalization, then he is hereby ordered and directed to so surrender said certificate of citizenship when, as, and if it ever comes into his possession to the Clerk of this Court, who shall thereupon take the action mentioned in the preceding paragraph hereof.

It is further ordered, adjudged and decreed that the Clerk of this Court shall forward a certified copy of this decree to the Commissioner of Immigration and Naturalization Service, Department of Justice, Philadelphia, Penn-
[fol. 54] sylvania, and to the District Director of the Immigration and Naturalization Service, Department of Justice, Chicago, Illinois, and to the Clerk of the Lake Superior Court of Lake County Indiana.

It is further ordered, adjudged and decreed that the United States of America, plaintiff, have and recover of and from the said defendant Otto Albert Willumeit the costs of this suit to be taxed.

Enter: Nunc pro tunc as of May 23, 1944.

Campbell, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Dated at Chicago, Illinois, this 9th day of June, A. D. 1944.

[fol. 55] IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

I, Roy H. Johnson, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 9th day of June, A. D. 1944, nunc pro tunc as of May 23, 1944, as fully as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this tenth day of June, A. D. 1944.

Roy H. Johnson, Clerk. (Seal.)

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[fol. 56] EXHIBIT NO. 7

C. Form No. 61 b. Judgment and Commitment

DISTRICT COURT OF THE UNITED STATES, DISTRICT OF CONNECTICUT

No. 6763

Criminal [1] in One Counts for Violation of U. S. C., Title 50, Secs. 34

UNITED STATES

v.

OTTO WILLUMEIT

On this 21st day of August, 1942, came the United States Attorney, and the defendant Otto Willumeit appearing in proper person, and [2] with counsel and,

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[1] Indictment or information.

[2] Insert (*a*) "by counsel" or (*b*) "having been advised of his constitutional right to counsel and having been asked whether he desired counsel assigned by the Court, replied that he did not," whichever is applicable.

The defendant having been convicted on [3] Plea of Guilty of the offense charged in the [1] indictment in the above-entitled cause, to wit:[4]

Conspiracy to violate Espionage Act, etc., and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, It Is by the Court

Ordered and Adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of [5]

Sentence: 1st count. 5 years.

Probation: Under conditions of probation set forth in Probation Form 7, and that said defendant be further imprisoned until payment of said fine, or fine and costs, or until said defendant is otherwise discharged as provided by law.[6]

It Is Further Ordered that [7] —.

It Is Further Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.[8]

(Signed) J. Joseph Smith, United States District Judge.

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[3] Insert the words "his plea of guilty," "plea of nolo contendre," or "verdict of guilty," as the case may be.

[4] Name specific offense or offenses and specify counts upon which convicted.

[5] Insert sentence and any provision for payment of fine and state whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin; that is, with reference to termination of preceding term, or with respect to any other outstanding or unserved sentence.

[6] Strike out if Court did not so order.

[7] Indicate any order with respect to suspension and probation.

The Court recommends commitment to [9] —.

A True Copy. Certified this 27th day of September, 1945. (Signed) C. E. Pickett, Clerk, by Eleanor D. Caruso, Deputy Clerk.

[fol. 56a] Defendant delivered on August 21, 1942 to Federal Correctional Institution at Danbury, Conn., the institution designated by the Attorney General, together with certified copy of the within Judgment and Commitment.

Expense $11.76.

Bernard Fitch, U. S. Marshal, by —— ——, Deputy.

Filed —— ——, Clerk, U. S. District Court, Sep. 1, 1942, A. M., New Haven, Conn.

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[fol. 57] EXHIBIT No. 11

D. J. File No. 146-13-2-23-211

In the Matter of OTTO A. WILLUMEIT, Alien Enemy

ORDER

Whereas, Otto A. Willumeit, of Chicago, Illinois, a native of Germany, over the age of fourteen years, is within the United States and not a naturalized citizen thereof and has heretofore been apprehended as being potentially dangerous to the public peace and safety of the United States; and,

Whereas, it appears from all the evidence before me that said alien enemy should be interned; Now, Therefore, upon consideration thereof,

It Is Ordered that said alien enemy be interned.

(Signed) Francis Biddle, Attorney General.

Dated June 22, 1945.

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[8] Certified copy to accompany defendant to institution.

[9] For use of Court wishing to recommend a particular institution.

[fol. 58] EXHIBIT No. 12

D. J. File No. 146-13-2-23-211

In the Matter of OTTO A. WILLUMEIT, Alien Enemy

ORDER

Whereas, Otto A. Willumeit, is a German alien enemy over the age of fourteen years who has heretofore been interned by order of the Attorney General dated June 22, 1945; and,

Whereas, the said alien enemy was, at his request, accorded a full hearing before a Repatriation Hearing Board on the issue of his removal from the United States; and,

Whereas, upon consideration of the evidence presented before the Repatriation Hearing Board on May 7, 1946, I deem said alien enemy to be dangerous to the public peace and safety of the United States because he has adhered to a government with which the United States is at war or to the principles thereof; Now, Therefore,

It Is Further Ordered that, in the event the said alien enemy fails or neglects to depart from the United States within the said thirty days, the Commissioner of Immigration and Naturalization is directed to provide for the alien's removal to Germany.

(Signed) Tom C. Clark, Attorney General.

Dated, Washington, D. C., May 23, 1946.

True Copy.

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[fol. 59] EXHIBIT No. 16-B

UNITED STATES DISTRICT COURT, DISTRICT OF CONNECTICUT

Office of the Clerk, Post Office Building, New Haven 5

Charles Elliott Pickett, Clerk

Nov. 29, 1946.

District Director of Immigration and Naturalization, 107 West 62nd Street, New York 23, N. Y.

DEAR SIRS:

This is in answer to your letter of November 27, 1946—No. 0300—46619 H U concerning one Otto Albert Willumeit, No. 6763 Criminal.

Our docket shows that on Aug. 21, 1942 this defendant was sentenced by Judge Smith to five years in custody of the Attorney General for imprisonment. Judgment issued and was returned showing confinement on Aug. 21, 1942 at Federal Correctional Institution, Danbury, Connecticut. Time for appeal has apparently long since expired.

Yours very truly, C. E. Pickett, Clerk.

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[fol. 60] EXHIBIT No. 21

Statements of the Court and Counsel at the Imposition of Sentence

Mr. Dodd: Now your Honor, we come to the last of these defendants, Dr. Otto Willumeit. And I should say to the Court at the outset that of all of them Dr. Willumeit is certainly the best. He has some character. He apparently comes from a very fine family. His grandfather fought with the Union army as I understand it as a surgeon over here for quite some time. His father was a postmaster general of Germany, not the same thing as our Postmaster General here, he tells me. I understand there are about five of them. But he was one of the five over an area of some size.

He was educated in Germany. He came to this country, was married, has been a citizen for some time.

This I can say about Dr. Willumeit, that as far as I know he did not lie to us, nor did he lie on the witness stand. I think he told the truth, what he insists is the truth, and we do not know that it is any different, and we accept it. At least we have no reason for disbelieving him, your Honor, for not believing him. We think he told the truth. We don't know that he told us all that he knew about it. It has been our belief, after having gone into this thing pretty thoroughly with him, that he was more or less caught in it without perhaps intending to go as far as the others went.

From the day he was up here, excepting a few moments in the United States Attorney's office, or we don't think he did . . . he has told us since that he just didn't remember. And that may be so. But excepting for those first few hours I think he did tell us the truth as far as we are able to question him with what he had at hand. And he testified for the Government in this case honestly about the conversation in Chicago. And he told us that it was Kunze who first men-

tioned the name of Molzahn because he was there and heard it. And even when he was brought in here again by the defense I think he told the truth.

[fol. 61] He is a young man. And I understand he is married to a woman of intelligence and honor who is herself interned, by the way, as a dangerous enemy alien. But I think that is largely due to his position as the Chicago leader of the Bund because her internment took place before he was involved in this case. I have a feeling, your Honor, that Dr. Willumeit can be restored to decent citizenship in this country. I think he has something that he can give to America.

I wouldn't want to see him suffer too much. I have talked with him personally. Mr. Cooney has talked with him at great length. And I might tell the Court that Mr. Cooney has developed quite an affection for Dr. Willumeit, and he has asked me to say to the Court that he feels that he is the type of man that something can be done for.

I agreed to make no recommendation. He was the one defendant who never asked for anything. I made no promise to him at any time about sentence. He was the only one.

And you will recall that the defense in the Molzahn case thought, because he testified for us, he must be getting something pretty good. I never promised this man and his lawyer anything and never told them I would make a recommendation. And he never asked for it.

That has been his attitude throughout, or it was soon after he was indicted. And he said, "I will try to tell you the truth and do what I can to help you."

I think, your Honor, he should be leniently dealt with, as leniently as the Court can deal with a man in this predicament at this time. Vonsiatsky got five years. There was that mental difficulty there. I do not know what to recommend to this Court in this case, but I would say that the Government would view a lenient sentence as a just sentence under all the circumstances. We think something can be done with this man. We do not think he is a bad man at [fol. 62] heart, your Honor. We think he is probably a good man who got in with bad company and got in with this trouble.

Further, Mr. Cooney just reminds me that we believed this defendant thought Kunze had abandoned this conspiracy and was going to stay in this country, and there is some reason for believing he wanted it abandoned.

I say to your Honor I am not his lawyer. I am supposed to be hard with him, I guess, if I believe in it. But in this case I do not feel that this man is a bad actor. I think there is a place for Dr. Willumeit in America in time, and he may become a most useful citizen.

Mr. Gideon: (Defendant's counsel) . . .

Mr. Dood: I might say to your Honor, that it is our hope, although I know you can't control it, that he will not be confined in one of the larger federal penitentiaries where these other men may be. But I think that is something we probably can take up later.

I would say that I really feel myself that this man is different. His participation was slight, and I don't say these things, as you know, unless I believe them. I would like to see him get a break; I think he deserves it. I think he has something in him and I think something can be done with him.

The Court: He apparently has been an opportunist and may not have had any deep convictions, so far as the Nazi ideas were concerned, in taking part in this conspiracy. But he did lend himself to it, and the Court feels that a substantial sentence is indicated in this case and will sentence him to imprisonment for a term of five years.

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[fol. 63] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1949

No. 82

STIPULATION AS TO PRINTING OF RECORD—Filed August 29, 1949

It Is Stipulated and Agreed that the following portions of the immigration file which is a part of the original record in this Court shall be printed: (1) Warrant of deportation, dated May 16, 1947; (2) Findings of Fact and Order of Board of Immigration Appeals, dated May 16, 1947; (3) Findings and Order of the Commissioner of Immigration, dated April 22, 1947; (4) the following Exhibits in evidence at the Hearing before the Presiding Inspector on January 9 and 10, 1947: Exhibit 4 (Final Decree of Denaturalization in 1944); Exhibit 7, (Copy of Judgment of Conviction and

commital of petitioner in the District Court for Connecticut in 1942); and Exhibits 11, 12, 16 B and 21.

Eugene H. Nickerson, Counsel for Petitioner; Philip B. Perlman, Solicitor General, Counsel for Respondent.

August 15, 1949.

[fol. 64] [File endorsement omitted.]

Endorsed on Cover: Enter William Dean Embree. File No. 53,819. U. S. Court of Appeals, Second Circuit. Term No. 82. The United States of America, ex rel. Otto A. Willumeit, Petitioner, vs. W. F. Watkins, District Director, Immigration and Naturalization Service. Petition for a writ of certiorari and exhibit thereto. Filed May 26, 1949. Term No. 82 O. T. 1949.

(4109)